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Supreme Court of the United States

October Term, 1966

No. 1083

CLIFFORD DELAIN DAVIS,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported as STATE v. DAVIS, 265 NC 720 (Advance Sheets —No. 5—issued the 10th of December, 1965). The Opinion of the Supreme Court of North Carolina is also set forth in the petitioner's appendix at p. 6.

The Judgment of the Trial Court, which is a court of general jurisdiction, is not reported in any official publication. It can be found in the State Record certified to this court by the petitioner.

JURISDICTION

The petitioner invoked the jurisdiction of this court under the provisions of 28 U.S.C. 1257, (3), alleging a violation of constitutional rights secured by the Fifth and Fourteenth

Amendments. The Respondent, State of North Carolina, denies the petitioner has shown sufficient basis for this court to exercise its jurisdiction.

QUESTION PRESENTED

WERE THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED IN THAT HE WAS INDICTED FOR THE CAPITAL CRIME OF RAPE, BUT WAS FOUND GUILTY BY A JURY OF ASSAULT WITH INTENT TO COMMIT RAPE WHICH IS ALLOWED IN NORTH CAROLINA BY NORTH CAROLINA GENERAL STATUTE 15-169 AND 15-170?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petitioner relies upon Section 1 of the Fourteenth Amendment and the Fifth Amendment of the Constitution of the United States.

Petitioner also attacks Sections 15-169 and 15-170 of the General Statutes of North Carolina, which read in the following manner:

N.C.G.S. 15-169 — "CONVICTION OF ASSAULT, WHEN INCLUDED IN CHARGE. On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and define a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

N.C.G.S. 15-170 — "CONVICTION FOR A LESS DEGREE OR AN ATTEMPT. Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

STATEMENT OF THE CASE

In this Brief, the Respondent will refer to the State Record certified to this court by the Clerk of the Supreme Court of North Carolina by the designation of "S.R.".

On the 28th of December, 1964 about 6:20 or about 6:25, the victim in this case, Eugenia Elizabeth Upchurch left her home, went to the home of Mrs. John W. Wells on Riverside Drive to a supper she was having for her son and girlfriend visiting there from out-of-state. Miss Upchurch left the supper shortly after the meal, due to the fact that she was working on a term paper and had to go to the library before it closed. She left the Wells' home between 8:15 and 8:20 and went straight to the library about three blocks from the Wells' home. She was driving a 1959 black Oldsmobile and parked directly in front of the Credit Production Place across from the library. She got out and went into the library and told the librarian the information she wanted for the term paper. She found where she could obtain the material and told the librarian she would come back in the morning for it. She left the library about twenty-five or twenty minutes before nine o'clock and walked out of the library and went straight to her car. She observed a boy or a man going in the same direction that she was; he was walking in the middle of the street toward the alley of the Credit Production Place. The main thing she noticed about him was that he was wearing a light beige sweater like the type she had given her brother not long ago. She got in the car and the next thing she knew, someone had opened the door and jumped in the car from the right hand side. The person had the

sweater pulled up over his face and he jumped on top of her and told her to drive. She argued with him for a while and he persisted in his order that she drive. She tried to push him off because she thought he was joking. She had her left hand free so she opened the door and yelled for help to the people she recognized that were passing in another car. After that, he jerked her back in the car and put a knife to her throat and told her not make that mistake again. Holding a knife at her throat he gave her directions to drive to a secluded spot where he forced the victim to have two acts of sexual intercourse with him in the front seat of the car. Upon completion of these acts, he gave the victim directions back to town where she let him out. She then immediately proceeded home and upon reaching there, went into her home and told her parents what had happened. A little later in the evening she told the police that the person who raped her was the petitioner.

The petitioner was indicted upon a bill of indictment charging him with rape of Eugenia Elizabeth Upchurch. The Solicitor put the defendant on trial for the capital crime of rape at the February 15, 1965 Term of the Criminal Superior Court of Johnston County. The defendant pled not guilty. Thereupon the State introduced evidence and the defendant introduced evidence. The jury returned a verdict of guilty of assault with the intent to commit rape. The petitioner moved to set the verdict aside. Motion was denied and the petitioner excepted. The court pronounced Judgment against the defendant, that he be imprisoned in the State's Prison for a term of not less than twelve nor more than fifteen years. Defendant, Clifford Delain Davis objected to the Judgment and excepted thereto and appealed forma pauperis to the Supreme Court of North Carolina.

ARGUMENT

Petitioner contends that he was denied due process of law because he, "was found guilty of a crime of which he was not charged or found by a Grand Jury."

The indictment in the instant case reads, "The jurists for

the State upon their oath present: that Clifford Delain Davis of Johnston County on or before the 28th day of December, 1964 with force and arms and at and in the county aforesaid did unlawfully, willfully, and feloniously ravish and carnally know Eugenia Elizabeth Upchurch a female by force and against her will and against the form of the statute in such case made and provided and against the peace and dignity of the State;" clearly charging the crime of rape in North Carolina.

In STATE v. ROY, 233 NC 558, 64 SE 2d 840 (1951) the Supreme Court of North Carolina ruled on the exact question of the petitioner. In the ROY case, supra, the defendant contended that since all the evidence pointed toward the crime of rape, and the State not having asked for a conviction of that crime, his motion for non-suit on the charge of assault with intent to commit rape should have been allowed.

The court said, "The contention is without merit, for it is well settled that an indictment for the offense includes all the lesser degrees of the same crime. STATE v. MOORE, 227 NC 236, 42 SE 2d 84; STATE v. GAY, 224 NC 141, 29 SE 2d 458; STATE v. JONES, 222 NC 37, 21 SE 2d 812; STATE v. HIGH, 215 NC 244, 1SE 2d 563; STATE v. WILLIAM, 185 NC 685, 116 SE 736; STATE v. HILL, 181 NC 558, 107 SE 140. And, although all the evidence may point to a commission of a graver crime charged in the bill of indictment, the jury's verdict of an offense of a lesser degree will not be disturbed, since it is favorable to the defendant. N.C.G.S. 15-169; STATE v. BENTLEY, 223 NC 563, 27 SE 2d 738; STATE v. HARVEY, 228 NC 62, 44 SE 2d 472; STATE v. MATTHEWS, 231 NC 617, 58 SE 2d 625." An assault with intent to commit rape is a lesser degree of the felony in the crime of rape, STATE v. BRICKHEAD, 256 NC 494, 124 SE 2d 838; STATE v. GREEN, 246 NC 717, 100 SE 2d 52.

The State of North Carolina respectfully submits that the indictment in the instant case fully and completely charges the crime of rape and that the crime of assault with intent

to commit rape is a lesser degree of the crime of rape and that therefore the indictment contains and does charge the crime of assault with intent to commit rape.

N.C.G.S. 15-169 and 15-170, which the petitioner contends are unconstitutional, but fails to furnish any reason or authority to sustain such belief, allows the jury to acquit the defendant of the capital felony and find him guilty of a lesser degree of that crime, providing elements of such lesser crime are charged in the indictment and supported by the evidence.

Petitioner asks this court to declare North Carolina General Statutes 15-169 and 15-170 unconstitutional. In his petition he cites in support of his contention the case of STATE v. HAUP, 47 F. Supp. 834, but this case does not deal with lesser degrees of crimes but with sufficiency of the indictment, in that it must inform the accused of what he must defend against when his case comes to trial. The petitioner in the instant case cannot conceivably contend that he was not prepared by the State's indictment to defend himself against the crime of which he was found guilty.

Petitioner cites STEROF v. UNITED STATES, 361 US 212, 80 S. Ct. 270, 4 L. ed. 2d 252 in support of his contention that the evidence does not support the verdict of the jury, but he avoids the testimony that the victim testified he held a knife to her throat, S.R., p.p. 8, 9, 10, 12, or that by means of force and threats he had two acts of sexual intercourse with her. S.R., p.p. 10, 11. Additionally, the STEROF case deals with the variance between pleadings and proof and in no way supports his contention that the North Carolina General Statutes are unconstitutional.

The petitioner has drawn unfounded conclusions, including that his constitutional rights were violated, but he avoids pointing to any specific error or instance of the Trial Court or of the Supreme Court of North Carolina that did not insure him a complete and impartial fair trial.

CONCLUSION

It is respectfully submitted that the Respondent has demonstrated:

1—That no Federal question was properly presented by the petitioner either in the Trial Court or upon appeal to the Supreme Court of North Carolina;

2—No Federal question was passed on or reviewed by the Trial Court or the Supreme Court of North Carolina;

3—That the petitioner was not deprived of any constitutional rights guaranteed by the Fourteenth Amendment or the Fifth Amendment of the Constitution of the United States in the trial of his case.

Therefore, the Respondent urges this court to deny this petition for writ of certiorari.

Respectfully submitted,

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